IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-5[illegible]

MICHAEL J. CASSIUS, Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF ARIZONA

Law Offices
PIMA COUNTY PUBLIC DEFENDER
Attorneys for Petitioner
By: Frederick S. Klein
Assistant Public Defender
45 West Pennington Street
Tucson, Arizona 85701

LAW OFFICES
PIMA COUNTY
PUBLIC DEFENDER
THIRD FLOOR
PIONEER TITLE BLDG.
TUCSON, ARIZONA 85701
792-8145

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MICHAEL J. CASSIUS, Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF ARIZONA

The petitioner MICHAEL J. CASSIUS, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this case on April 16, 1974, and made final by the order of the Supreme Court of the State of Arizona denying petitioner's motion for rehearing entered on May 21, 1974.

Opinions Below

The opinion of the Supreme Court of the State of Arizona, filed April 16, 1974 is reported at 110 Ariz. 485, 520 P.2d 1109 (1974); and the opinion of the Court of Appeals of the State of Arizona, Division Two, filed November 8, 1973, is reported at 21 Ariz. App. 78, 515 P.2d 903 (1973).

Jurisdiction

The judgment of the Supreme Court of the State of Arizona was entered on April 16, 1974. A timely motion for rehearing was denied on May 21, 1974, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is

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792-8145

involved under 28 U.S.C.A. 1257 (3).

Questions Presented

1. Did not petitioner's conviction of "committing a felony while on bail on felony charge," Ariz. Rev. Stat. Ann. § 13-1580 (Supp. 1973), violate petitioner's rights under the Double Jeopardy Clause of the Fifth Amendment, as applied to the States through the Fourteenth Amendment to the Constitution?

2. Did not petitioner's conviction of "committing a felony while on bail on felony charge," Ariz. Rev. Stat. Ann. § 13-1580 (Supp. 1973), violate petitioner's rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution?

Constitutional and Statutory Provisions Involved

The principal United States Constitutional provisions involved are the Double Jeopardy Clause of the Fifth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Article 2, Section 22 of the Arizona Constitution, and Section 13-1580 of the Arizona Revised Statutes Annotated are set forth below:

Ariz. Const. art. 2, § 22:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
> 1. Capital offenses when the proof is evident or the presumption great.
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Ariz. Rev. Stat. Ann. § 13-1580:

> "A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such

> penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

Statement of the Case

On October 17, 1972, petitioner, then 21 years old, was arrested and charged with burglary of a motor vehicle. The following day, he was released on his own recognizance. Case No. A-22479 was subsequently assigned to this matter.

On November 4, 1972, while released on his own recognizance on the first charge, petitioner was arrested at the scene of an apparent store burglary. Petitioner was charged, Case No. A-22303, with two counts: Count I, first degree burglary (Ariz. Rev. Stat. Ann. § 13-302 (Supp. 1973)), and Count II, "committing a felony while on bail on felony charge" (Ariz. Rev. Stat. Ann. § 13-1580 (Supp. 1973)).

Proceedings were held on January 4, 1973, at which time the charge in Case No. A-22479 was dismissed on the prosecutor's motion and petitioner pleaded guilty to Count I of Case No. A-22303. Count II of Case No. A-22303 was submitted to the court on stipulated facts, and petitioner was found guilty.

On January 22, 1973, petitioner was sentenced to imprisonment under Count I for not less than one nor more than two years, and to a consecutive term under Count II of not less than one nor more than three years.

On appeal, petitioner argued in his briefs that this conviction under Count II violated the Constitutional protection against Double Jeopardy. The Arizona Court of Appeals, on November 8, 1973, reversed petitioner's conviction under Count II (Ariz. Rev. Stat. Ann. § 13-1580), holding section 13-1580 violative of the Equal Protection Clause of the Fourteenth Amendment, and refusing to consider petitioner's claim that the

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statute also subjected him to double jeopardy in violation of the Fifth and Fourteenth Amendments. State v. Cassius, 21 Ariz. App. 78, 515 P.2d 903 (1973).

The Arizona Supreme Court granted a Petition for Review by the State and petitioner, thereafter, obtained permission to file a memorandum of additional argument in which he argued both the claim of double jeopardy and that of denial of equal protection. On April 16, 1974, the Arizona Supreme Court vacated the Court of Appeals' decision and affirmed petitioner's conviction. The Arizona Supreme Court expressly rejected petitioner's claims of double jeopardy and of denial of equal protection. State v. Cassius, 110 Ariz. 485, 520 P.2d 1109 (1974). On May 21, 1974, that Court denied petitioner's Motion for Rehearing.

Requests for certification and transmission of the record in this case have been filed in both the Arizona Supreme Court and the Superior Court of the State of Arizona, in and for the County of Pima.

Argument I

PETITIONER'S CONVICTION OF ARIZ. REV. STAT. ANN. § 13-1580 SUBJECTED HIM TO DOUBLE JEOPARDY.

Ariz. Rev. Stat. Ann. § 13-1580 makes any "person who is convicted of committing any felony offense" also "guilty" of the felony offense set forth therein, provided only that the first offense "is committed while such person is released on bail or his own recognizance on a separate felony charge." That is, a person who is convicted of one felony offense is thereby guilty of two felony offenses. Could there be a more classic definition of multiple jeopardy for the same offense? See, North Carolina v. Pearce, 395 U.S. 711, 717 (1969); Ex parte Nielsen, 131 U.S. 176 (1889). As the Arizona Court of Appeals stated, for a "single act,

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[petitioner] has been convicted and sentenced for two felony offenses." 21 Ariz. App. at 82, 515 P.2d at 907.

It is important to note that section 13-1580 creates a separate offense and does not merely provide for an augmentation of punishment. Thus a conviction under section 13-1580 is relevant in determining whether and to what extent a recidivist penalty provision, such as Ariz. Rev. Stat. Ann. §§ 13-1649 & 13-1650, should apply, and how time credits for good behavior, such as Ariz. Rev. Stat Ann. § 31-251(B), will be computed. It is not clear whether or under what circumstances a reversal of the conviction for the primary offense would mandate a reversal of the conviction for section 13-1580. Unlike a penalty augmentation provision, where some discretion whether to apply the provision rests with the trial court (see, State v. Jacobson, 110 Ariz. 70, 515 P.2d 27 (1973)), the sole discretion whether to impose the penalty of section 13-1580 rests with the prosecutor. Because section 13-1580 does create a separate offense, a prosecutor, at his whim or design, may charge a defendant with a violation of section 13-1580 after a defendant has been sentenced under the primary conviction or even after a defendant has completed serving his sentence.

It also should be noted that the Constitution demands that one charged with the crime be presumed innocent until proven guilty. In re Winship, 397 U.S. 358 (1970). Yet section 13-1580 clearly presumes that one merely charged with a crime is more culpable when he thereafter commits a crime than a person not previously charged who committed the same crime.

It makes no difference whether the standard used for determining if there is double jeopardy for the same offense is the "same elements test", Blockburger v. United States, 284 U.S. 299 (1932), or the "same transaction test", see Ashe v. Swenson, 397

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U.S. 436, 448-460 (1970) (Brennan, J., joined by Douglas & Marshall, J.J., concurring). The constituent elements of a crime are the same as their sum total, conviction of the crime. Section 13-1580 would have the same meaning if instead of reading "[a] person who is convicted of committing any felony offense", it read "[a] person who is convicted of committing robbery, or burglary, or grand theft, or arson, or any other felony offense."

Indeed, the only possible difference between the primary offense which supplies the necessary conviction and the "offense" described by section 13-1580 is the factor of commission while released on a pending felony charge. Under Arizona law, this factor is not an element of a crime. A crime "is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction," penal sanctions. Ariz. Rev. Stat. Ann. § 13-101 (1956). The corpus delicti, or elements, of a crime are (1) that a certain result has been produced, and (2) that some person is criminally responsible for the act. State v. Thomas, 78 Ariz. 52, 59, 275 P.2d 408, 413 (1954). Assuming competency, the elements of criminal responsibility are an actus reus (act or omission) and a mens rea (requisite mental state). See R. Anderson, Wharton's Criminal Law and Procedure §§ 60-70 (1957). The fact of being released on bond or recognizance is neither an act or omission on the defendant's part, nor a mental state, nor a consequence of the actus reus of A.R.S. § 13-1580. It is a status over which the courts have ultimate control, and the release may or may not conform to the defendant's will and volition. To illustrate, it must be conceded that if a court of competent jurisdiction orders a defendant released on his own recognizance, that defendant must be released even though he wishes to remain in jail (and there are such defendants).

Punishment for a status is prohibited by the Eighth

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Amendment's Cruel and Unusual Punishment Clause, Robinson v California, 370 U.S. 660 (1962), as well as, under circumstances such as those prescribed by section 13-1580 (i.e., application to and easily ascertainable group and punishment without the necessity of an additional trial) by the Bill of Attainder Clause of Article I, Section 10 of the Constitution. The State of Arizona can no more make it a separate crime to be convicted of a felony committed while released on bail or recognizance for another felony charge than it can make it a separate crime to be convicted of a felony committed while unemployed.

Because petitioner's conviction under Ariz. Rev. Stat. Ann. § 13-1580 violates the Double Jeopardy Clause of the Fifth Amendment, as applied to the States by the Fourteenth Amendment, that conviction should be reversed.

Argument II

PETITIONER'S CONVICTION OF ARIZ. REV. STAT. ANN. § 13-1580 DENIED HIM EQUAL PROTECTION OF THE LAWS.

Article 2, Section 22 of the Arizona Constitution establishes release upon furnishing sufficient sureties as a constitutional right. Regarding this right, the Arizona Court of Appeals in its opinion in this case stated:

> "Although bail is conditioned upon the giving of "sufficient sureties", Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S.1, 72 S.Ct. 1, 96 L.Ed. 3 (1951): This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. [Citations omitted] Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning. 21 Ariz. App. at 83, 515 P.2d at 908.

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Having granted such a right, a state cannot implement it in such a way as to create invidious discriminations. Griffin v. Illinois, 351 U.S. 12 (1956). Where a discrimination has the effect of chilling or impairing the exercise of a fundamental right, the discrimination may be characterized as invidious and will only be sustained under the Equal Protection Clause if it can be shown to be demonstrably necessary to promote a compelling state interest. E.G., Shapiro v. Thompson, 394 U.S. 618, 634 (1969); United States v. Jackson, 390 U.S. 570 (1968); Williams v. Rhodes, 393 U.S. 23 (1968); Sherbert v. Verner, 374 U.S. 398 (1963); Skinner v. Oklahoma, 316 U.S. 535 (1942); In re King, 3 Cal.3d 226, 474 P.2d 983, 90 Cal. Rptr. 15, (1970); Spillers v. State, 84 Nev. 23, 436 P.2d 18, (1968).

The effect of section 13-1580 is to create two classes of convicted felons -- one class of persons who commit felonies while in custody on pending untried charges or while released on pending misdemeanor charges or while not facing criminal charges, and another class of persons who commit felonies while released on pending untried felony charges. The sole difference between those awaiting trial on felony charges in the two classes is that those in the second class have exercised their constitutional right to release. On the basis of this distinction, the second class is found guilty of two felonies for every felonious act committed, while the first class is found guilty of only one. The Arizona Court of Appeals ably illustrated how this discrimination operates:

> "A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits aggravated battery on a police officer. Pursuant to a plea bargain, the original burglary charges against both A and B are dropped in exchange for a plea of guilty to the battery charges. Notwithstanding the fact that A and B have committed identical crimes, A may be convicted of two crimes--

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THIRD FLOOR
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TUCSON, ARIZONA 85701
792-8145

> (1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, A can only be convicted of aggravated battery because his crime was committed in jail. Taken one step further, assume that A had been mistakenly accused and was totally innocent of the burglary charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail." 21 Ariz. App. at 84, 515 P.2d at 909.

It should be added that the decision whether and when to charge the additional offense of section 13-1580 is left solely to the prosecutor's discretion.

The Arizona Court of Appeals correctly stated:

> "A.R.S § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.
>
> . . . Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make bail an instrument of oppression which our Supreme Court has denounced. [Gusick v. Boies, 72 Ariz. 309, 734 P.2d 430 (1951)]. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.
>
> Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. Gusick, supra. By singling out those admitted to bail, A.R.S. § 13-1580 strips the innocent of that presumption. One accused of a crime is not ipso facto a menace to society as A.R.S. § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence." 21 Ariz. App. at 85, 515 P.2d at 910.

Section 13-1580, though chilling a right hallowed in Anglo-American jurisprudence and protected by the Arizona Constitution, is not demonstrably necessary to promote a compelling State

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THIRD FLOOR
PIONEER TITLE BLDG.
TUCSON, ARIZONA 85701
792-8145

interest. The duty of an individual to obey the law exists and draws its vitality independently of section 13-1580. Release from custody is conditioned upon good behavior, Ariz. Rev. Stat. Ann. § 13-1577 (D); such release can be revoked upon a breach of that condition, Rendel v. Numbers, 106 Ariz. 233, 474 P.2d 824 (1970), Ariz. Rev. Stat. Ann. § 13-1578; and subsequent release can be denied, Ariz. Const. art.2, § 22 (2). The fact that a crime was committed while the defendant was released on another pending charge is certainly a matter which the trial court can take into consideration in determining the severity of the penalty to be imposed. Cf. Williams v. New York, 337 U.S. 241, 246-49 (1949); State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962).

Further, section 13-1580 requires that the sentence therein provided be served consecutively to the sentence for the offense committed while on release. Such a requirement of consecutive service of sentences appears no where else in the Arizona statute. There can be no rational basis for allowing one who commits two separate burglaries to serve concurrent sentences on these offenses, while a person who commits only one burglary must serve two consecutive sentences merely because his burglary was committed while he was released on a pending charge of which he was presumed innocent. Such an unreasonable disparity in sentencing practices and severity also violates the Equal Protection Clause. See James v. Strange, 407 U.S. 128 (1972).

Because petitioner's conviction under Ariz. Rev. Stat. Ann. § 13-1580 violates the Equal Protection Clause of the Fourteenth Amendment, that conviction should be reversed.

Conclusion

For the foregoing reasons, a writ of certiorari should issue

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PIMA COUNTY
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THIRD FLOOR
PIONEER TITLE BLDG.
TUCSON, ARIZONA 85701
792-8145

to review the judgment and opinion of the Supreme Court of the State of Arizona.

Respectfully submitted this 9th day of August, 1974.

Law Offices
PIMA COUNTY PUBLIC DEFENDER

45 West Pennington, 3rd Floor
Tucson, Arizona 85701

By: _____
FREDERICK S. KLEIN
Assistant Public Defender
Counsel for Petitioner

LAW OFFICES
PIMA COUNTY
PUBLIC DEFENDER
THIRD FLOOR
PIONEER TITLE BLDG.
TUCSON, ARIZONA 85701
792-8145

CLIFFORD H. WARD
CLERK

Supreme Court

STATE OF ARIZONA
Phoenix
85007

May 22, 1974

STATE OF ARIZONA,

Appellee,

v.

MICHAEL J. CASSIUS aka CARL JACKSON,

Appellant.

Supreme Court
No. 2867-PR

Pima County
No. A-22303

FILED
1974 MAY 23 AM 8:33
CLERK SUPREME COURT

The following action was taken by the Supreme Court of the State of Arizona on May 21, 1974 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = Denied."

Copy of Order Affirming Judgment and Sentence enclosed herewith.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: John M. Neis, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701 ATTN: Frederick S. Klein, Esq.
Hon. Gary K. Nelson, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 ATTN: Frank T. Galati, Esq.
Howard L. Fell, Assistant Attorney General, 415 West Congress, Tucson, Arizona 85701
Dennis DeConcini, Pima County Attorney, 131 West Congress, Tucson, Arizona 85701
West Publishing Company, 50 West Kellogg Boulevard, St. Paul, Minnesota 55102
Michael J. Cassius aka Carl Jackson, Arizona State Prison, Box B, Florence, Arizona 85232

dkb

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	)	No. 2567-PR ORDER AFFIRMING JUDGMENT AND SENTENCE

Appeal from the Superior Court of Pima County Number A-22303
Honorable Jack G. Marks, Judge

Gary K. Nelson, The Attorney General
by Howard L. Fell, Assistant Attorney General
and Frank Leto, Third Year Law Student

Attorneys for Appellee

Ed P. Bolding, Former Pima County Public Defender
John M. Neis, Pima County Public Defender
by Richard Van Duizend, Former Deputy Public Defender
and Jeffrey W. Hanes, Third Year Law Student

Attorneys for Appellant

The above cause was presented in your Court and was brought before the Court of Appeals, Division Two, No. 2 CA-CR 331, in the manner prescribed by law. That Court rendered its Opinion and caused the same to be filed on the 8th day of November, 1973. A Petition for Review was granted by this Court on the 22nd day of January, 1974.

- - - - - - - - - - - -

This cause having been heretofore submitted, and the Court having duly considered same, and being now advised in the premises, files its Opinion. It is accordingly ORDERED that the opinion of the Court of Appeals is vacated, and the judgment and sentence of the trial court entered in the above-entitled cause be affirmed, to comply with the Opinion of this Court, attached hereto.

DONE IN OPEN COURT this 16th day of April, 1974.

STATE OF ARIZONA
SUPREME COURT

I, CLIFFORD H. WARD, Clerk of the Supreme Court of the State of Arizona, hereby certify the above to be a full and true copy of the

Order Affirming Judgment and Sentence, made and entered in the above-entitled cause by said Court on the 16th day of April, 1974.

IN WITNESS WHEREOF, I hereunto set my hand and affix the official seal of said Court this 22nd day of May, 1974.

CLIFFORD H. WARD, Clerk

By Mary Adams Jackson
Chief Deputy Clerk

cc: Hon. Gary K. Nelson, Attorney General; Dennis DeConcini, Pima County Attorney; Hon. Jack G. Marks, Judge; Hon. Ben C. Birdsall, Presiding Judge of Pima County; Department of Corrections; Superintendent of Arizona State Prison; John M. Neis, Pima County Public Defender; Michael J. Cassius aka Carl Jackson; Mrs. Elizabeth Urwin Fritz, Clerk of the Court of Appeals, Division Two.

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILE
APR 16 197[illegible]
CLIFFORD H. W[illegible]
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
MICHAEL J. CASSIUS aka CARL JACKSON,
Appellant.

NO. 2567-PR

Appeal from the Superior Court of Pima County
Honorable Jack G. Marks, Judge
(Cause No. A-22303)

JUDGMENT AND SENTENCE AFFIRMED

Opinion of the Court of Appeals, Division Two,
21 Ariz. App. 78, 515 P.2d 903 (197[illegible]) Vacated

Gary K. Nelson
The Attorney General — Phoenix
By Howard L. Fell
Assistant Attorney General — Tucson

Frank Leto
Third Year Law Student — Tucson

Attorneys for Appellee

John M. Neis
Pima County Public Defender — Tucson

Ed P. Bolding, Former
Pima County Public Defender — Tucson
By Richard Van Duizend
Former Assistant Public Defender — Tucson

Jeffrey W. Hanes
Third Year Law Student — Tucson

Attorneys for Appellant

- 1 -

HAYS, Chief Justice

The defendant, Michael J. Cassius, also known as Carl Jackson, appealed from a judgment finding him guilty of having committed a felony while free on his own recognizance, in violation of A.R.S. § 13-1598. The Court of Appeals reversed the trial court in State v. Cassius aka Jackson, 21 Ariz. App. 78, 515 P.2d 903 (1973). We granted the state's petition for review. We vacate the opinion of the Court of Appeals and affirm the judgment and sentence of the Superior Court.

Defendant, while free on his own recognizance on a burglary charge, was caught burglarizing a building less than three weeks after his release. Because of the second burglary, he was indicted on two counts: (1) first degree burglary, and (2) committing a felony while free on his own recognizance. As a result of a plea bargain, he pleaded guilty to the first count--the second burglary--and agreed to be tried on the second count with the evidence limited to the grand jury minutes and the stipulation that he was free on his own recognizance at the time of the second arrest. In return, the state dismissed the charges based on the first burglary. The trial judge sentenced him to one to two years in prison for the burglary, and imposed a consecutive sentence of one to three years after finding him guilty on Count 2.

On appeal, defendant raised two questions: (1) whether the second count was a violation of the double jeopardy clause of the state and federal constitutions, and (2) whether the second count was a violation of A.R.S. § 13-1641, which provides that a conviction and sentence for a criminal

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act bar a subsequent prosecution for the same act.

The Fifth Amendment to the United States Constitution provides that no person shall be twice put in jeopardy for the same offense. This prohibition is binding upon the states. Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). The Arizona Constitution, Art. 2 § 10, contains substantially the same language.

The fallacy of defendant's argument on the issue of double jeopardy is that we are not, in the instant case, dealing with the same offense. The first count charged him with burglary. The second count charged him with being convicted of a felony while free on his own recognizance. These offenses are entirely different.

The question of whether two offenses are the same, and the criteria for resolving that question, are set out in State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971). There, we held that in order to constitute different offenses, no element of either offense may be an element of the other; i.e., the two offenses must not contain a common element. It is quite obvious that the two offenses with which defendant was charged have no common element.

The federal courts use a different test, less favorable to the defendant. They hold that the offenses charged are not the same if each contains an element not contained in the other. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). It is, therefore, perfectly clear that double jeopardy is not a viable defense in this case. These matters are analyzed in 14 Arizona Law Review 513.

Defendant's second point is that the conviction and

sentence under A.R.S. § 13-1580 violates A.R.S. § 13-1641 which reads:

> "An act or omission which is made punishable by different sections of the laws may be punished under either, but in no event under more than one. An acquittal, or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

The material part of A.R.S. § 13-1580 reads:

> "A person who is convicted of committing any felony offense . . . which felony offense is committed while such person is released . . . on his own recognizance on a separate felony charge, is guilty of the offense of committing a felony while released on . . . his own recognizance, and upon conviction . . . shall be punished by imprisonment . . . for not more than five years."

It is, of course, obvious that these two sections can be read as contradictory unless some sort of statutory construction is applied to them, since a person who commits a felony while free on his own recognizance, may be guilty of two felonies under § 13-1580.

We will not assume that the legislature, in enacting a statute, was unaware of an existing statute. Arizona State Board of Directors v. Phoenix Union High School Dist., 102 Ariz. 69, 424 P.2d 819 (1967). Where statutes in pari materia are in apparent conflict, they should be construed in harmony so as to give force and effect to each. State Land Dept. v. Tucson Rock & Sand Co., 107 Ariz. 74, 481 P.2d 867 (1971). Where a later statute does not expressly repeal a former one, they should be construed so as to give effect to each, if possible. State v. Jaastad, 43 Ariz. 458, 32 P.2d 799 (1934). When dealing with separate statutes, the court must construe them so as to give meaning to both, if possible. Finch v. State Department of Public Welfare,

the legislature did not intend to do a foolish thing by including in a statute a provision which is nonoperative or invalid. Kelly v. Bastedo, 70 Ariz. 371, 220 P.2d 1069 (1950). Where a statute first expresses a general intent, and later an inconsistent particular intent, such particular intent will be taken as an exception to the general intent, and both will stand. Sakrison v. Pierce, 66 Ariz. 162, 185 P.2d 528 (1947).

We believe the application of these rules should and does lead us to the conclusion that the legislature intended to engraft § 13-1580 onto § 13-1641 as an exception so that the two statutes should be read to mean that for one act there may be only one prosecution except when it is committed while the accused is out of jail on his own recognizance. Read in this way, neither quoted section conflicts with the other, and each is given full effect. We therefore hold that the position taken by defendant in his second point is untenable.

Ordinarily, covering all of the points made by defendant in his appeal brief disposes of the appeal and points the way to the final disposition, unless a search of the record discloses some fundamental error not raised by defendant. We have examined the record for fundamental error and find none. However, we note that the Court of Appeals also examined the record for fundamental error and found that it existed in the form of a violation of the equal protection clause of the state and federal constitutions. The court's holding is based on the argument that A.R.S. § 13-1580 creates two classes of persons and treats them differently. The court felt that

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of that class to be convicted of a crime, while the class which has not exercised the right to bail is not so restricted. We completely disagree with this reasoning.

While it is true that the right to bail has a constitutional basis, it has always been recognized that limitations may be imposed upon it. Generally, bail is granted on condition that the defendant stay within the court's jurisdiction and that he conduct himself as a law-abiding citizen. Rule 7.3 of the new Rules of Criminal Procedure, 17 A.R.S., makes this last requirement mandatory. There has never been any doubt that these are legitimate conditions. The Court of Appeals felt that our statute has the effect of chilling the assertion of the constitutional right to bail by penalizing those who choose to exercise that right, but merely requiring that a man abide by the law is not a chilling limitation; it is a requirement that he is obligated to follow whether or not on bail, and it existed even before bail was granted.

The opinion of the Court of Appeals recognizes that it would be constitutional to increase the punishment for a crime committed while out on bail! We fail to see the distinction. As a matter of fact, we have a recidivist statute, enhancing the punishment of defendants who have prior convictions, and it has never been held to be a violation of the equal protection clauses. In State v. Sanchez, 110 Ariz. 214, 516 P.2d 1226 (1973), we cited the following language of the United States Supreme Court.

"The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is done without any reasonable basis, and therefore is purely arbitrary." 516 P 2d at 1229.

* * *

"When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted, must be assumed." 516 P.2d at 1229.

* * *

"One who assails the classification in such a law must carry the burden of showing that it does not rest on any reasonable basis, but is essentially arbitrary. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S. Ct. 337, 340, 55 L. Ed. 369 (1911)." 516 P.2d at 1229.

It is true that, as the Court of Appeals points out, it is unconstitutional to legislate that different treatment be accorded to persons placed by statute into different classes, on the basis of criteria wholly unrelated to the objective of that statute. We see no application of that rule to this case.

The opinion of the Court of Appeals is vacated, and the judgment and sentence of the Superior Court are affirmed.

JACK D. H. HAYS, Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Vice Chief Justice

FRED C. STRUCKMEYER, JR., Justice

LORNA E. LOCKWOOD, Justice

WILLIAM A. HOLOHAN, Justice

Supreme Court

State of Arizona

February 20, 1974

THE STATE OF ARIZONA, Appellee, v. MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	)	Supreme Court No. 2867-PR Court of Appeals No. 2 CA-CR 231 Pima County No. A-22393

The following action was taken by the Supreme Court of the State of Arizona on February 19, 1974 in regard to the above-entitled cause:

"ORDERED: Request for Oral Argument = Denied.

FURTHER ORDERED: Motion for Leave to Submit Authorities = Granted.

FURTHER ORDERED: Defendant granted 30 days in which to submit said authorities."

CLIFFORD H. WARD, Clerk

By Mary Ann Stephens
Deputy Clerk

TO: Ed Bolding, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701 ATTN: Frederick S. Klein, Esq.
Hon. Gary K. Nelson, The Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 ATTN: Grove M. Callison, Esq.
Howard L. Fell, Assistant Attorney General, 415 West Congress, Tucson, Arizona 85701

dkb

Supreme Court

State of Arizona

FILED: January 23, 1974

CORRECTED COPY

THE STATE OF ARIZONA, Appellee,	Supreme Court No. 2867-PR
v.	Court of Appeals No. 2 CA-CR 331
MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	Pima County No. A-22303

The following action was taken by the Supreme Court of the State of Arizona on January 22, 1974 in regard to the above-entitled cause:

"ORDERED: Petition for Review - Granted."

The Supreme Court has adequate sets of briefs. Therefore, no additional briefs will be necessary.

CLIFFORD H. WARD, Clerk

By Mary Ann Hughes
Deputy Clerk

TO: Gary K. Nelson, The Attorney General, 159 Capitol Building, Phoenix, Arizona 85007 ATTN: Grove M. Callison, Esq.
Howard L. Fell, Assistant Attorney General, 415 West Congress, Tucson, Arizona 85701
Ed Bolding, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701 ATTN: Richard Van Duizend, Esq.
Hon. Jack G. Marks, Judge of the Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701
Mrs. Elizabeth Urwin Fritz, Clerk of the Court of Appeals, Div. 2, 415 West Congress, Tucson, Arizona 85701
West Publishing Company, 50 Kellogg Boulevard, St. Paul, Minn. 55102

dkb

THE STATE OF ARIZONA, Appellee,	2 CA-CR 331
v.	O R D E R
MICHAEL J. CASSIUS, aka CARL JACKSON, Appellant.	Pima County Superior Court Cause No. A-22303

IT IS ORDERED that the Motion for Rehearing be, and the same hereby is, denied.

Dated: December 11, 1973.

James D. Hathaway, Chief Judge

Lawrence Howard, Judge

Herbert F. Krucker, Judge

Copies to:

Ed Bolding, Esquire
Pima County Public Defender
Attention Richard Van Duizend, Esquire
Deputy Public Defender
Third Floor, Pioneer Title Building
45 West Pennington
Tucson, Arizona 85701

The Honorable Gary K. Nelson
The Attorney General
State Capitol Building
Phoenix, Arizona 85007

The Honorable Dennis DeConcini
County Attorney, Pima County
Attention Tom Letnes, Esquire
Deputy County Attorney
Sixth Floor, Administration Building
131 West Congress Street
Tucson, Arizona 85701

John S. O'Dowd, Esquire
Assistant Attorney General
166 Arizona State Office Building
415 West Congress Street
Tucson, Arizona 85701

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THE STATE OF ARIZONA, Appellee, v. MICHAEL J. CARLOS aka CARL JACKSON, Appellant.	)	NO. 2 CA-CR 931 O R D E R RE: PIMA County Superior Court Cause No. A-22303

Gary K. Nelson, The Attorney General — Phoenix
by Howard L. Fell, Assistant Attorney General, and Frank Leto, Certified Third-Year Law Student under Rule 28(e) — Tucson

Attorneys for Appellee

Ed Bolding, Pima County Public Defender — Tucson
by Richard Van Duizend, Assistant Public Defender, and Jeffrey W. Hares, Certified Third-Year Law Student under Rule 28(e)

Attorneys for Appellant

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk, and, under the Rules of the Supreme Court, Rule 47(e), fifteen days are allowed from this date to file a Motion for Rehearing.

IT IS FURTHER ORDERED that a copy of this order, together with a copy of the opinion, be sent to each party appearing or the attorney for such party and to the Honorable Jack G. Marks, Judge.

Dated: November 8, 1973.

Lawrence Howard
Lawrence Howard
Acting Chief Judge

Copies mailed as directed this
8th day of November, 1973.

Elizabeth Urwin Fritz
Elizabeth Urwin Fritz, Clerk.

CLERK COURT OF APPEALS
Division Two

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL J. CASSIUS aka CARL JACKSON, Appellant.	)	No. 2 CA-CR 331 O P I N I O N

Appeal from the Superior Court of Pima County
Cause No. A-22303

Honorable Jack G. Marks, Judge

REVERSED

Gary K. Nelson, The Attorney General — Phoenix
by Howard L. Fell, Assistant Attorney General — Tucson
and Frank Leto, Certified Third-Year Law Student
under Rule 28(e)

Attorneys for Appellee

Ed Bolding, Pima County Public Defender — Tucson
by Richard Van Duizend, Assistant Public Defender
and Jeffrey W. Hanes, Certified Third-Year Law Student
under Rule 28(e)

Attorneys for Appellant

K R U C K E R, Judge.

This is an appeal from a judgment of conviction and sentences on one count of burglary, first degree, A.R.S. § 13-302, and one count of committing a felony while released on bail or on own recognizance on a separate felony charge, A.R.S. § 13-1580.

The peculiar facts of this case are: On October 17, 1972, appellant, Michael Jerome Cassius, was arrested and charged with burglary, Cause No. A-22479. The following day, he was released on his own recognizance.

On November 4, 1972, while released on his own recognizance on the first burglary charge, appellant was again arrested for burglary and was charged in Cause No. A-22303 on two counts: Count I, violation of A.R.S. § 13-302 (burglary, first degree) and Count II, violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance on a separate felony charge).

Proceedings were held on both burglary charges on January 4, 1973. At that time, Cause No. A-22479 was dismissed upon motion of the County Attorney. In Cause No. A-22303, appellant plead guilty to Count I, burglary, and Count II was submitted to the court on the basis of the Grand Jury transcript and stipulation of counsel that at the time of the second burglary appellant was released on his own recognizance in Cause No. A-22479. The court accepted appellant's guilty plea on Count I and found him guilty on Count II.

On January 22, 1973, appellant was sentenced to imprisonment for one and not more than two years on Count I and a consecutive term of not less than one nor more than three years was imposed for the Count II conviction. This appeal followed.

Appellant submits two questions for review:

1. Whether appellant's conviction for violation of A.R.S. § 13-1580 (committing a felony while released on bail or on own recognizance) constituted double jeopardy under the Fifth Amendment of the United States Constitution and Art. 2 § 10 of the Arizona Constitution?

2. Whether the sentence imposed pursuant to A.R.S. § 13-1580 violated the statutory proscription of A.R.S. § 13-1641 against double punishment for the same offense?

Before we dispose of the issues raised by appellant, we first consider the State's contention that the issues of double jeopardy and double punishment were not raised below, therefore,

nent affect substantial rights requiring this court on its own initiative to notice the defects. We agree with appellee that the double jeopardy issue is not preserved for appeal. However, we find the issue of double punishment properly submitted for review.

Generally, in Arizona the issue of double jeopardy must not be raised for the first time on appeal. State v. Veres, 7 Ariz.App. 117, 436 P.2d 629 (1968), cert.den. 393 U.S. 1014. The purported stipulation relied on by appellant is the following statement of the prosecutor:

> "MR. HOWARD: The charge in count 2 is committing a felony while released on his own recognizance on another felony charge, Your Honor, and the public defender would like to reserve their right to examine that Statute on appeal, so are reluctant to enter a plea at this point, and would prefer to submit it to the Court on the stipulated facts in the Grand Jury transcript, and there are certain matters which I will ask the Court to take judicial notice of from the Court file."

We find this insufficient to preserve the double jeopardy issue for review.

Appellant also asserts that he had no opportunity to raise this issue at the trial court level. We find no merit in this argument. Appellant, after having been found guilty on Count I, made no attempt to utilize Rule 177, Rules of Criminal Procedure, 17 A.R.S.[1/] as to Count II on the grounds of prior conviction or double jeopardy. Appellant's failure to raise the issue of double jeopardy below precludes appellate consideration of such issue.

As to the issue of double punishment, however, it may be raised for the first time on appeal. State v. Mills, 96 Ariz. 377, 396 P.2d 5 (1964). We therefore turn our attention to

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[1/] This case is decided on the law as it existed prior to September 1, 1973.

appellant's contention that the sentences imposed on Count I and Count II constituted double punishment in violation of A.R.S. § 13-1641, which provides:

> "An act or omission which is made punishable in different ways by different sections of the laws may be punished under either, but in no event under more than one. An acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other."

Prior to the Supreme Court decisions in State v. Mitchell, 106 Ariz. 492, 478 P.2d 517 (1970), and State v. Tinghitella, 108 Ariz. 1, 491 P.2d 834 (1971), there appeared to be some confusion in applying A.R.S. § 13-1641. However, as formulated in Mitchell, supra, and adopted in Tinghitella, supra, an "identical elements" test is the standard, requiring elimination of the elements in one charge and a determination of whether the facts left support the other charge. See also, State v. Horton, 108 Ariz. 16, 492 P.2d 395 (1972); State v. George, 108 Ariz. 5, 491 P.2d 838 (1971); and State v. Bartky, 16 Ariz.App. 421, 493 P.2d 1226 (1972).

In spite of the seeming simplicity of this statute and the test, judicial interpretation and application to a given set of facts has proven to be a complex task. This case is no exception.

Our review of the myriad of cases dealing with the application of A.R.S. § 13-1641 sheds no light on the problem sub judice. We find no case with a factual posture remotely similar to this case. However, there is one common denominator -- the purpose of the subject statute is to protect an offender against double punishment for a single act which violates more than one statute. See, Mitchell, supra; State v. Andrews, 106 Ariz. 372, 476 P.2d 673 (1970); State v. Ballez, 102 Ariz. 174, 427 P.2d 125 (1967); and State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1960).

As previously noted, appellant, in Cause No. A-22303, was found guilty and sentenced on two counts: Count I, violation

of A.R.S. § 13-302, and Count II, violation of A.R.S. § 13-1580. The pertinent provisions of these statutes are:

"§ 13-302. Definition and degrees of burglary; punishment

A. A person entering a building, dwelling house, office, room, apartment, tenement, shop, warehouse, store. . . with intent to commit grand or petty theft, or any felony. . . is guilty of burglary.

B. Burglary committed in the nighttime is burglary of the first degree, punishable by imprisonment in the state prison for not less than one nor more than fifteen years."

"§ 13-1580. Committing felony while on bail on felony charge; penalty

A person who is convicted of committing any felony offense, whether federal or state, which felony offense is committed while such person is released on bail or his own recognizance on a separate felony charge is guilty of the offense of committing a felony while released on bail or his own recognizance and upon conviction of such crime shall be punished by imprisonment in the state prison for not more than five years. Such penalty shall be in addition to and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance."

The elements necessary to prove Burglary, first degree, are: (1) an entry, (2) with intent to commit a felony, and (3) commission in the nighttime. A violation of A.R.S. § 13-1580 requires (1) a conviction of committing any felony, (2) which is committed while a person is released on bail or his own recognizance on a separate felony charge.

Appellant's only act was the burglary of November 4, 1972, which was committed while he was released on his own recognizance on a separate felony charge. For this single act, he has been convicted and sentenced for two felony offenses. If one or all of the elements of burglary are eliminated, what facts are left to support the charge under A.R.S. § 13-1580? There are none. We find no other act by appellant, hence no support for a charge under A.R.S. § 13-1580. The factual basis for conviction under either statute is the same act on the part of appellant.

The State, however, argues that the elements of A.R.S. § 13-1580 are different, i.e., (1) commission of a felony and (2) such felony having been committed during a designated period. We find such argument specious. The "conviction" element is a prior act, not appellant's, leaving only the burglary as the act of appellant. To adopt the State's construction would defeat the very purpose of A.R.S. § 13-1641 and allow the prosecution to accomplish indirectly that which cannot be done directly.

Application of the "identical elements" test enunciated by our Supreme Court would mandate the conclusion that the statutory prescription of A.R.S. § 13-1641 has been violated. However, to so hold would render A.R.S. § 13-1580 completely inoperative. We must presume that the legislature did not intend to do a futile act in enacting A.R.S. § 13-1580. Campbell v. Superior Court, 105 Ariz. 252, 462 P.2d 801 (1969). We also assume that the legislature was aware of the existence of A.R.S. § 13-1641 and therefore that A.R.S. §§ 13-1641 and 13-1580 were intended to operate as a compatible whole. See, Arizona State Board of Directors v. Phoenix Union High School District, 102 Ariz. 69, 424 P.2d 819 (1967). It must, therefore, have been the intention of the legislature to except from A.R.S. § 13-1641 the later-enacted A.R.S. § 13-1580. However, whether or not such exception was intended, we are of the opinion that A.R.S. § 13-1580 is violative of the equal protection clause of the 14th Amendment to the United States Constitution.

Initially we note that appellant did not attack the constitutionality of A.R.S. § 13-1580 in the trial court. Generally, constitutional questions must first be presented to the trial court for determination. Porter v. Eyer, 80 Ariz. 169, 294 P.2d 661 (1956). However, fundamental error is such error as goes to the foundation of the case, or which takes from a defendant a right essential to his defense, State v. Pulliam, 87 Ariz. 216, 349 P.2d 781 (1960), and we must search the record

rights, principally those affecting constitutional rights, solely to prevent a miscarriage of justice. State v. Gilreath, 107 Ariz. 218, 487 P.2d 385 (1971).

As stated in State v. Pugh, 31 Ariz. 317, 252 P. 1013 (1927):

> "But where for any constitutional reason the law under which a party is being prosecuted is void, the question need not be formally raised, as when that fact is discovered by the court, even on appeal, it will be considered." 31 Ariz. at 319.

Therefore, in accordance with our absolute duty to protect constitutional rights, Marquez v. Rapid Harvest Co., 1 Ariz.App. 562, 405 P.2d 814 (1965), and to prevent a miscarriage of justice, we raise the constitutionality of A.R.S. § 13-1580 ex mero motu.

Since this case involves a crime relating to bail and the release of one on his own recognizance, it is important to understand the nature and purpose of bail. In Arizona, bail is a constitutionally protected right. Art. 2 § 22 of the Arizona Constitution provides:

> "All persons charged with crime shall be bailable by sufficient sureties, except for:
>
> 1. Capital offenses when the proof is evident or the presumption great.
>
> 2. Felony offenses, committed when the person charged is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge."

Although bail is conditioned upon the giving of "sufficient sureties," Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970), it is nonetheless a constitutionally protected right. As stated in Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951):

> "This traditional right to freedom before conviction permits the unhampered preparation

of a defense, and serves to prevent the infliction of punishment prior to conviction. Proper regard for this right demands that it be preserved, the traditional way in which, consistent with good conscience, it can be made sure." 72 S.Ct. at 3.

Bail is erected for the sole purpose of securing attendance of the defendant in court at all times when his presence may be lawfully required, and his surrendering himself in execution of any lawful judgment that may be pronounced against him. Cunico v. Boies, 72 Ariz. 369, 234 P.2d 440 (1951). When setting bail, the judge should take into account the defendant's prior arrests and convictions, his record of appearances at court proceedings, his record of flight to avoid prosecution, and his failure to appear at court proceedings. Rendel v. Mummert, supra. It is assumed that the threat of forfeiture of one's goods will be an effective deterrent to the temptation to breach the conditions of one's release. Brandy v. United States, ___U.S.___, 81 S.Ct. 197, ___L.Ed.2d___ (1960).

With this background, we turn to the constitutionality of A.R.S. § 13-1580. The basic principles governing application of the equal protection clause of the Fourteenth Amendment are familiar. As the Chief Justice recently explained in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971):

> "In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); Railway Express Agency v. New York, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial

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[illegible]
[illegible]
[illegible]
258 [illegible], 4.5, 47 [illegible], 14 L.Ed. 989
(1 [illegible]). [illegible] at 402, 403

A.R.S. § 13-1580 creates two classes of accused persons and treats them differently. Thus the question is whether a different treatment of those on bail or their own recognizance as opposed to those remaining in jail bears a rational relationship to the objectives apparently sought to be advanced by the operation of A.R.S. § 13-1580.

This statute was not adopted from any other jurisdiction, and we know of no other jurisdiction with a similar one. Although there is no legislative history to shed light on the legislative intent, and we have not had the benefit of appellate argument thereon, it is evident that A.R.S. § 13-1580 has a two-fold objective: (1) deterrence of criminal activity on the part of individuals who have been released on bail or on their own recognizance, and (2) enhancement of punishment of those who engage in criminal activity while so released. Those objectives are clearly rational and reasonable. However, the operation of this statute transcend those objectives.

When the legislature enacted A.R.S. § 13-1580, it created a separate criminal offense -- the offense of committing a felony while released on bail or own recognizance. By statute, a class of individuals who have exercised their state constitutional right to bail has been singled out. As to these individuals, the legislature has declared it to be a crime to be convicted of a crime. On the other hand, had they failed to exercise their constitutional right and remained in jail, there can be no such crime.

A simple illustration will demonstrate how this statute operates. For example, A and B are both arrested and charged with burglary. A is released on bail and B remains in jail. While released, A commits aggravated battery on a police officer. While in jail, B also commits aggravated battery on a police officer.

Pursuant to [illegible], the criminal battery charges [illegible] both A and B are charged [illegible] battery charges. Therefore, the [illegible] of A and B have committed identical crimes, A may be convicted of two crimes: (1) aggravated battery and (2) committing a felony while released on bail or own recognizance. However, B can only be convicted of aggravated battery because his crime was committed in jail. Taking one step further, assume that A had been mistakenly accused and was totally innocent of the burglary charge. Under A.R.S. § 13-1580 he may still be convicted of two criminal offenses for the single battery solely because the act was committed while on bail. We fail to see any rational relationship between the objectives of A.R.S. § 13-1580 and its operation.

The Supreme Court of California in the case of In re King, 3 Cal.3d 226, 90 Cal.Rptr. 15, 474 P.2d 983 (1970), held unconstitutional a California statute which prescribed varying penalties between two categories of non-supporting fathers -- (1) those who remain out of state for 30 days and (2) those who do not. Under the statute, any father who remained out of the state of California for 30 days while not supporting his child was guilty of a felony and a father who committed the identical act of criminal nonfeasance, but happened to be within California, was guilty only of a misdemeanor. The court found this provision a denial of equal protection of the laws because it created additional criminal liability on an individual solely because he chose to remain outside the state. The court pointed out that:

> "'If a law has 'no other purpose' * * * than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' United States v. Jackson, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.Ed.2d 138 (1968).'" 90 Cal.Rptr. at 21, 22

Similarly, in Spillers v. State, 84 Nev. 23, 436 P.2d 18 (1968), the Supreme Court of Nevada held unconstitutional a statute

which provided that a person convicted of rape could not be sentenced to death if the case were tried to the court, but death could be imposed if affixed by a jury verdict. The court stated:

> "A State may not prescribe different penalties for the same offense without violating the equal protection concept. Thus the statute is unconstitutional insofar as it allows a jury to impose a greater penalty than a court for the same offense, thus violating the Sixth and Fourteenth Amendments to the federal constitution, and Art. 2, § 3 of our State constitution." 436 P.2d at 23.

Although King and Saillens were not concerned with a state constitutional right to bail, they denounced exactly that which our statute attempts -- (1) the prescribing of different penalties for the same offense and (2) penalizing one for exercising a constitutional right. A.R.S. § 13-1580 not only prescribes different penalties for the same offense, but also creates an additional crime for the same offense, which crime can only be committed after one has exercised his constitutional right to bail.

As noted earlier, the sole purpose of bail is to secure the attendance of a defendant at trial. Making it an offense to be convicted of a felony which was committed while on bail neither helps secure the attendance of a defendant at trial nor insures compliance with the legal processes of this State. It serves no other purpose than to make bail an instrument of oppression which our Supreme Court has denounced. Gusick, supra. Our legislature has effectively chilled the assertion of the constitutional right to bail by penalizing those who have chosen to exercise it.

Regardless of the character of the crime, an accused on bail is clothed with the presumption of innocence. Gusick, supra. By singling out those admitted to bail, A.R.S. § 13-1580 strips the innocent of that presumption. One accussed of a crime is not ipso facto a menace to society as A.R.S. § 13-1580 seems to presume. Such a presumption erodes the very foundation of our system of criminal justice, namely, the presumption of innocence.

If one is in fact a person to society, adequate means for the devices already exist. Art. 2 § 22 of our constitution is designed to protect society from the dangerous. Paragraph 2 of that section denies bail, under designated circumstances, to a person who commits a felony while admitted to bail. A court may in its discretion set a higher bail for a defendant having recidivist tendencies. Release from custody is conditioned on good behavior while so released, A.R.S. § 13-1577(D), and upon a breach of such condition, bail may be revoked. A.R.S. § 13-1578; Rendel, supra.

To achieve the objectives of A.R.S. § 13-1580, there is a reasonable way available with a lesser burden on the constitutionally protected right to bail. As was done in the District of Columbia[2/] the legislature could enact a law enhancing the punishment of those who commit a felony while released on bail or own recognizance. Unlike our statute, in the District of Columbia it is not a crime to commit a crime while released on bail.

Although we need not decide the question of inverse discrimination, it should be noted that in Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), it was recognized that if a wrongdoer were insulated from punishment because of indigency, equal protection would be denied the offender who is

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[2/] D.C. Code Ann., § 23-1328 (1971), provides:

> "Penalties for offenses committed during release
>
> (a) Any person convicted of an offense committed while released pursuant to section 23-1321 shall be subject to the following penalties in addition to any other applicable penalties:
>
> (1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and
>
> (2) A term of imprisonment of not less than ninety days and not more than one year if convicted of committing a misdemeanor while so released.
>
> (b) The giving of a warning to the person when

(Footnote 2 continued on page 13)

punished. The Supreme Court stated:

> "The State is not seeking to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to invidious discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction." 90 S.Ct. at 2024.

Under A.R.S. § 13-1580, one on bail or own recognizance is punished twice for one act, whereas the person who cannot afford bail is insulated from such double punishment even though he committed the identical act. The indigent who cannot afford bail is subject to a single charge.

We agree that the legislative objective in enacting A.R.S. § 13-1580 is commendable, but it is unfortunate that, as written, it cannot withstand constitutional scrutiny. We therefore hold that A.R.S. § 13-1580 is unconstitutional and appellant's conviction on Count II cannot stand. The judgment of conviction and sentence imposed thereon are ordered vacated.

HERBERT F. KRUCKER, Judge

CONCURRING:

JAMES D. HATHAWAY, Chief Judge

LAWRENCE HOWARD, Judge

(Footnote 2 continued)

> released of the penalties imposed by this section shall not be a prerequisite to the application of this section.
>
> (c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment."

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